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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA, Plaintiff, v. **RICARDO PALOS-MARQUEZ,** Defendant.	Case No. 08CR0547-JM DATE: April 11, 2008 TIME: 11:00 A.M. STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS

I.

STATEMENT OF FACTS[1]

A. Background of the 2007 Incident

On August 7, 2007 Border Patrol Agent Wilson was positioned on Interstate 8, two miles east of Japatul Valley Road Exit, and observed a white Ford Explorer. See August 2007 Investigation Report at 3 (attached as Exhibit A). According to his report, he observed that the vehicle was "riding extremely low to the ground as if it was carrying a heavy load." Id. Agent Wilson's report also contains the there-unsupported statement that "alien smugglers use sport utility vehicles and vans like the explorer to transport large amounts of illegal aliens." Id. The driver and front passenger were sitting upright and wearing their seatbelts. Id. Agent Wilson then ran a check on the license plate number, and apparently, there were no indication of warrants, but only the name, Jimenez-Aguilar as the registered owner. Id. Then, the vehicle

[1] Unless otherwise noted, these facts are based on discovery provided by the government. Mr. Palos reserves the right to take a contrary position at a later juncture.

began to sway from side to side. Id. Finally, something that appeared to be a human head briefly emerged from the backseat. Id. Palos pulled over. Still, Agent Wilson just followed the vehicle. One Agent Wakefield then performed a vehicle stop by utilizing his emergency lights and sirens. Id. Agents then stormed the vehicle, displaying badges and tactical vests. Id. at 4.

Mr. Palos disputes the factual assertions that the vehicle was swaying from side to side, and that a human head appeared in the rear windshield. See Second Declaration of R. Palos (attached as Exhibit G).

Mr. Palos was arrested for transporting illegal aliens. After his arrest, Mr. Palos waived his Miranda rights and gave a confession, admitting to knowledge of his passenger's illicit status; having a history of alien smuggling; being paid for his illegal venture; the name of his employers; and several other incriminating details. See id. at 4. See also Miranda v. Arizona, 384 U.S. 436, 444 (1966). This confession was memorialized in a I-831 investigation report. See id. Prosecution was declined. See id. at 5.

B. Background of the February 2008 Incident

On February 7, 2008 Mr. Palos was in a vehicle headed westbound on Otay Lakes road. See February 2008 Investigation Report at 2 (attached as Exhibit B). Reportedly, Agent Padron overheard, via radio, Agent Simon state that he heard that a UPS driver witnessed several suspected illegal aliens get into a vehicle. Id. There is nothing else in the report about this UPS driver. At this point, Agent Padron did not pull over the vehicle, but followed the vehicle and performed a records check, and apparently did not receive and suspicious information. Id. Agent Padron then pulled over the vehicle before it pulled on the State Route 125 on-ramp. Id.

Agent Padron pulled the vehicle over and arrested Mr. Palos. See id. Mr. Palos was then interrogated and made incriminating statements. See id. On February 11, 2008, the government filed a complaint charging Mr. Palos with transportation of illegal aliens per 8 U.S.C. §1324 (a)(1)(A)(ii). See Clerk's Docket Sheet at 1.

C. Background of Plea Negotiations

Originally, Assistant United States Attorney Caroline Han was the "Grand Jury" attorney assigned to this case. She extended a plea-agreement including only the February 2008 incident. See Declaration of E. Guzman (attached as Exhibit C). During negotiations, Ms. Han pointed out that Mr. Palos had a prior arrest for alien transportation in August 2007, and produced relevant discovery. See id. Mr. Palos's counsel inquired whether the government was making a new offer that would incorporate--and provide resolution for--the August 2007 events. See Declaration of E. Guzman (attached as Exhibit C). Mrs. Han stated that a new offer was **not** being extended. See id. Mr. Palos did not accept the government's offer and exercised his right to have his case presented to the Grand Jury. The government then presented Mr. Palos' case to the January 2007 Grand Jury. On February 27, 2008, the government filed a five count indictment, charging Mr. Palos with not only the February 2008 allegations, but also one count stemming from the August 2007 arrest. See Clerk's Docket sheet at 7.

These motions follow.

II.

THIS COURT MUST DISMISS COUNT ONE OF THE INDICTMENT BECAUSE IT WAS FILED TO PUNISH MR. PALOS FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO PLEAD NOT GUILTY AND TO HAVE HIS CASE PRESENTED TO THE GRAND JURY

A. The Law

Mr. Palos can establish prosecutorial vindictiveness by one of two ways: 1) producing direct evidence of malice, see United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982); or 2) he can prevail upon a presumption of vindictiveness if he can show that the circumstances surrounding the filing of count one give rise to an appearance that it was "filed because []he exercised a statutory, procedural, or constitutional right." Untied States v. Jenkins, 504 F.3d 694, 699 (9th Cir. 2007) (citing Gallegos-Curiel, 681 F.2d at 1168).

In Jenkins, the defendant went to trial after being indicted for importing marijuana in violation of 18 U.S.C. § 952. Jenkins, 504 F.3d at 698. Several months prior to her arrest for drug importation, Ms. Jenkins was arrested for alien smuggling. Id. At the time of the arrest, Ms. Jenkins waived her Miranda rights, and confessed to knowledge of the hidden illegal aliens, and to attempting to violate United States immigration law. Id. At her trial, Ms. Jenkins testified she was unaware of the marijuana hidden in her car as she believed she was smuggling aliens. Id. Before a verdict was reached in that trial, the government filed a complaint, charging Ms. Jenkins with alien smuggling based on her previous arrest. Id. Ms. Jenkins then successfully moved to dismiss the indictment due to vindictive prosecution. Id. The government appealed, arguing that it only charged Jenkins with the alien smuggling after she testified, because her in court admissions to alien smuggling fortified their case. Id. at 699. The Court of Appeals was not persuaded, holding that "the government had more than enough evidence to proceed with the alien smuggling charges prior to Jenkins's decision to testify . . . we therefore find it appropriate to place the burden on the government to justify its course of conduct." Id. at 700 (citing United States v. Groves, 517 F.2d 450, 453-54 (9th Cir. 1978) (finding appearance of vindictiveness when government knew all of the facts relating to the second charge against the defendant at the time the first charge was brought, but only brought the second charge once the defendant moved to dismiss the first charge under the Speedy Trial Act)). The government failed to dispel the presumption of vindictiveness, and the dismissal was affirmed.

B. The Government's Conduct Creates a Presumption of Vindictiveness, Because It Appears Count One Was Filed Only Because Mr. Palos Exercised His Fifth Amendment Right of Presentment to the Grand Jury

1. Mr. Palos Does Not Have to Produce Direct Evidence of Actual Malice on Behalf of the Government

To compel dismissal of count one, Mr. Palos must "demonstrate a *reasonable likelihood"* that the government would not have filed count one had Mr. Palos not exercised his Fifth Amendment right of having his case presented to the Grand Jury. See Jenkins, 504 F.3d at 700 (emphasis in original); see also Gallegos-Curiel, 681 F.2d at 1169 ("[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal right.") (citing Goodwin, 457 U.S. 373, 384 (1982)). Moreover, if there is a "mere appearance" of vindictiveness, then the government bears the burden of dispelling that appearance. Jenkins, 504 F.3d at 700. Otherwise, defendants would fear being punished for exercising their rights. Id. (citing United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976)); see also United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977).

2. There Is an Appearance of Vindictiveness, Because All Relevant Facts Indicate That Count One Was Filed Solely To Punish Mr. Palos Exercising His Right of Presentment to the Gand Jury

In Jenkins, the Ninth Circuit held that an appearance of vindictiveness arose from the fact that the government already had a slam dunk case before Jenkins' testimony at trial. "The government's alien smuggling case essentially was open and shut even before Jenkins testified in court." Jenkins, 504 F.3d at 700. Specifically, the government possessed three separate admission by Jenkins, in which she confessed to alien smuggling. See id.

As in Jenkins, the government already had an "open and shut case" against Mr. Palos for the August 2007 alien transportation case. They had at least an I-831 investigation report memorializing Mr. Palos's detailed confession to transporting aliens on the day of his arrest. See August 2007 Investigation Report. The government also possessed an investigation report from an alien smuggling arrest in April 2006. See April 2006 Investigation Report (attached as Exhibit D). For icing on the cake, during the instant arrest in February 2008, agents asked Mr. Palos about the previous August 2007 arrest. At this point, Mr. Palos confirmed his August 2007 confession. See February 2008 Investigation Report at 3. Notwithstanding this mountain of evidence, the government did not charge Mr. Palos with the August 2007 events until he exercised his constitutional rights. At a minimum, these circumstances create an appearance of vindictiveness.

C. The Government Did Not Negotiate with the 2007 Charge

The government will likely claim the Court cannot find vindictiveness, because count one was filed after failed plea negotiations. See Bordenkircher v. Hayes, 434 U.S. 357 (1978). In Bordenkircher, the Supreme Court recognized the salutary aspects of plea bargaining, and held that given such, a prosecutor has some leeway to threaten an increased sentence or charge, in the context of plea negotiations, in order to induce the defendant to accept a plea bargain. See id. at 361-65. However, there are important aspects of Bordenkircher that distinguish it from this case.

First, in Bordenkircher the Supreme Court made clear that any threat of punitive action must be set out during plea negotiations, such that the defendant is fully informed as to what is at stake:

> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. [The defendant] was fully informed of the true terms of the offer when he made his decision to plead not guilty.

Id. at 360.

Second, the Supreme Court noted that in the context of plea negotiations, "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." Id. at 363.

Mr. Palos' situation is distinguishable from Bordenkircher. The August 2007 incident was never offered up as a negotiating chip. To the contrary, defense counsel specifically asked Assistant United States Attorney Han if the government was offering a new plea agreement, promising not to charge Mr. Palos with the August 2007 allegations. See Declaration of E. Guzman. There was no such offer, she replied. This is not like Bordenkircher, where the prosecutor offered to not file the recidivist enhancement if the defendant pled guilty. 434 U.S. at 358-59. Thus there was no such offer for Mr. Palos, and thus no "give and take" as required by Bordenkircher. Id. at 362 (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970) (opinion of Brennan, J)). Mr. Palos was not "free to accept or reject [an] offer," Bordenkircher 434 at 363, that would resolve the August 2007 allegations, as no offer existed.

The government never stated that they would prosecute Mr. Palos for the alleged August 2007 events, and therefore Mr. Palos was not "capable of intelligent choice in response to prosecutorial persuasion" as the defendant was in Bordenkircher, where the prosecutor made such a promise explicitly. See id. at 363.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Id. (internal citations omitted). Mr. Palos is plainly allowed to plead not guilty and have his case presented to the Grand Jury, and for that he is being punished vis-a-vis the filing of count one. Therefore, that count must be dismissed for vindictiveness.

III.

MOTION TO SUPPRESS FRUITS OF THE ILLEGAL FEBRUARY 2008 VEHICLE STOP

Agent Padron seized Mr. Palos without having reasonable suspicion or probable cause, in violation of the Fourth Amendment. All fruits of that illegal arrest must be suppressed. See Wong Sun v. United States, 371 U.S. 471 (1963).

A. Mr. Palos Has Standing

All occupants in a seized vehicle have standing to challenge the legality of the seizure. See Brendlin v. California, 551 U.S. ___ (2007).

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B. The Seizure of the Vehicle Was Not Supported by Reasonable Suspicion

1. Vehicle Stops Require Constitutional Scrutiny.

Terry v. Ohio, 392 U.S. 1 (1968), held that the Fourth Amendment allows officers armed with reasonable suspicion to temporarily detain someone. Yet the Terry Court itself recognized that even this lesser detention was still serious and was much more than an inconvenience. "It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." Id. at 10. Even a limited search is a "severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Id.

Under Terry, someone can be temporarily detained if "an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others. Id. at 24. The Terry court defined the relevant question as "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Terry, 392 U.S. at 21.

Courts "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. United States v. Arvizu, 534 U.S. 266, 273 (2002) (internal citations omitted). However, "[r]easonable suspicion may not be based on broad profiles which case suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." United States v. Sigmond-Ballesteros, 285 F.3d 1117, 1121 (9th Cir. 2002) (citing Arvizu, 534 U.S. at 273).

A vehicle stop must be supported by reasonable suspicion. Deleware v. Prouse, 440 U.S. 648, 653 (extending Terry stops to automobiles); see also Briogni-Ponce, 422 U.S. 873, 878 (1975) (applying Fourth Amendment protection to investigatory stops of vehicles).

In analyzing the legality of a vehicle stop, Courts inquire if all the factors known to the detaining officer "taken together all the they sufficed to form a particularized and objective basis for making the stop. Sigmond-Ballesteros, 285 F.3d at 1121. (internal citations omitted).

In Arvizu, officer relied on the following factors to perform a vehicle stop: there had been sensor alerts; the suspected vehicle appeared to be bypassing a checkpoint; the car was registered to an address "four bocks north of the border in an area notorious for alien and narcotics smuggling"; the knees of the children seemed to be raised; said children were waving mechanically, as if being ordered; the vehicle was not headed near a known camping sight; and the vehicle was of a van, which was known to be a favorite of alien smugglers. See Arvizu, 534 U.S. at 269-71. The Supreme Court upheld the stop and rejected the Ninth Circuit's "divide and conquer" jurisprudence. Id. at 267.

2. Terry and Its Progeny Require a Reliable Source of Information For Creating Reasonable Suspicion

The Fourth Amendment forbids officers from detain people based on suspicion of criminal activity unless it is reasonable. Officers can arrive at reasonable suspicion through various avenues, as long as the information upon which they found their suspicion must be reliable.

For example, when an officer forms reasonable suspicion based on his own first hand observations. Officers are presumed reliable as they have taken oaths to uphold the law and have specialized training in the field of crime prevention and detection. However, police observation is not the exclusive means of acquiring reasonable suspicion as Terry's copious progeny indicates.

Reasonable suspicion can be ascertained by a known informant that has a proven record of supplying authorities with accurate information. See Adams v. Williams, 407 U.S. 143, 147 (1972). If informants have a good track record of providing accurate tips are considered reliable sources.

Officers may also ascertain reasonable suspicion from a tipster with whom they speak *in person* even if they lack a record of accurate information. The potential liability they face for giving inaccurate information renders them a reliable source. United States v. Sierra-Hernandez, 581 F.2d 760, 763 (9th Cir. 1978) ("although the informant did not identify himself by name, he should have been available for further questioning if the agent had judged the procedure appropriate. Unlike a person who makes an anonymous telephone call, this informant confronted the agent directly . . . he was accountable for his intervention. **The reliability of the information was thus increased**.") (emphasis supplied).

A truly anonymous informant can also be a reliable source under the right circumstances[2]. Alabama v. White, 496 U.S. 325, 332 (1990) (holding that an anonymous tip that was sufficiently corroborate possessed sufficient indicia of reliability to impart reasonable suspicion). That is, if an anonymous

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informant provides a tip that is sufficiently corroborated by independent police investigation can constitute probable cause for a warrant.

3. An Informant Must Be Reliable

Courts addressing this issue have consistently focused their analyses on the reliability of the informant, requiring that under the totality of the circumstances, the source possess some indicia of reliability. Id. at 331 ("because an informant is shown to be right about some things, he is probably right about others) (internal citations omitted); United States v. Fernandez-Castillo, 324 F.3d 1114, 1118 (9th Cir. 2003) (emphasizing that report came from Department of Transportation officer who "could be held accountable for fabrication"); Adams v. Williams, 407 U.S. at 148 (holding that officers were justified in relying on tip of informant whom they knew personally and had previously provided information). Alabama v. White, 496 U.S. at 332, addressed this issue holding that an anonymous tip could constitute reasonable suspicion only if two requirements were meet: 1) the tip provided predictive information that was not easily predicted, and 2) it was corroborated by further police observation could constitute reasonable suspicion.

In White, police received an anonymous tip that a lady would be leaving a specific motel in a tan colored car, with a certain license plate number and carrying a brown attaché case containing cocaine and marijuana. Id. at 327. Police officers were in position at that motel at the specified time. Id. The police observed the car and it followed the course predicted by the informant. Id. The police then pulled over the car to ask the driver some investigatory questions, at which point the driver consented to the search of the car. Id. A brown attaché case was discovered and the driver also consented to the search of this as well. Id.

The Supreme Court held that the accuracy of the tip's predictions, and the further police corroboration constituted reasonable suspicion justifying officers pulling over the car. Id. at 332. The court emphasized that the tip was entitled to credibility because it evinced knowledge that only someone with "a special familiarity with the respondent's affairs" would possess. Id.

The Court stressed, however, that the tip alone would not have justified the detention. Id. at 329. The corroboration of the tip by the officers matured the tip into reasonable suspicion. Specifically, it was the corroboration of "significant aspect of the caller's predictions" that contributed to the formation of reasonable suspicion. Id. at 326.

This "close case" was the floor pronounced by the supreme court, the least reliable source that would suffice. Anything less would be uncivilized, but more importantly, an unreasonable seizure and thus constitutional.

Florida v. J.L.,529 U.S. 266 (2000) was a case that fell on the other side of the line demarcated by the supreme court in Illinois v. Gates, 462 U.S. 213 (1983) (upholding the validity of a warrant that was based on an anonymous tip). In J.L., the high court held that an anonymous tip that did not provide predictive information as to any alleged illegality could not warrant even a limited detention. The court explicitly stated that just giving a physical description was not enough. The court referred back to its opinion in Gates, which they referred to as a close case, and announced that this case was on the other side of that dividing line. Because the anonymous informant did not provide any predictive information, "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." Id. at 271.

The Court explicitly rejected the idea that a matching description and "readily observable location" was sufficient reasonable suspicion, because such a tip did not obviate that the tipster has any inside knowledge of concealed criminal activity. Id.

Again the court looked to the source of the information to determine reliability. This tip was given from a completely anonymous informant who had not earned any credibility by providing a tip that would render him more reliable. If a police officer drawing from past experience is the highpoint of reliability, this is definitely the low-end.

In United States v. Morales, 252 F.3d 1070 (9th Cir. 2001), officers received an anonymous tip that two Hispanics would be driving a white 1989 Ford Taurus, bearing Washington license plate number 772 JJY. The tip further claimed that they would be transporting a pound of methamphetamine from Spokane to Missoula, Montana. See id. The tip stated that the two Hispanics had left Spokane at 5:00 pm. See id. Around 9:00 P.M., a Washington officer spotted the automobile and followed. The officer did not observe the car commit any traffic violations. The officer ultimately pulled over the car 30 miles short of Missoula for having tinted windows. The drivers were handcuffed and placed in a patrol car while sniff-dogs smelled the Taurus. Id. at 1071-72. One half pound of meth was ultimately discovered in the car. The drivers' motion to suppress was granted. The prosecution appealed and the granting of the motion was affirmed. Id. at 1072.

The Ninth Circuit held that tip did not possess sufficient indicia of reliability to justify an investigative stop. Id. at 1077. The court pointed out that the tip case was more reliable than that of J.L. because it specifically described the car and its occupants, but it also predicts future movement. Yet, the Ninth Circuit stressed that the tip was less reliable than that of White, because it did not provide specifics as to origination and destination locations. Id. Moreover, the cops pulled over the car thirty miles prior to Missoula which prevented them from corroborating one of the main details. Id.

The court recognized that the tipster did have some inside knowledge because they accurately described the passengers of the car, and had prior knowledge of the license plate number. Id. These were facts "that could not come from mere observation of the defendants in the car. The Ninth Circuit held however that the tipster's capacity to adequately describe the car did not demonstrate that he or she was privy to details of concealed criminal activity. Id. "This case is weaker than White, which the court in J.L. described as 'borderline' and a 'close case.'" Id. (internal citations omitted).

In United States v. Thomas, 211 F.3d 1186 (9th Cir. 2000), an officer received a tip from a FBI agent that police "might want to pay particular attention to a certain house" in Tucson because there possibly drugs there. Officers began running surveillance on the house. Officers observed various "comings and goings" that they determined were consistent with drug activity. Id. at 1188. Officers then heard several loud noises that, according to their testimony, "sounded like marijuana." Id. Then an el camino left the house. Id. Other officers effected an investigatory stop of the car at which point they detected the smell of marihuana and ultimately discovered large amounts of marihuana in the car. Defendants motion to suppress the evidence was denied. Id. at 1189.

The Ninth Circuit analyzed the three factors supporting reasonable suspicion. They determined that even though the tip came from an FBI agent, the police did not know from what source the FBI formed their tip. For all they knew, it could have been from an anonymous tip. Thus, the tip bore no indicia of reliability. Id.

The court ruled that the "unremarkable comings and goings" were consistent with *any* activity and could not be used to constitute reasonable suspicion. (emphasis in original*)*. Id. at 1190.

The Ninth Circuit flatly rejected the notion that marijuana has a distinct sound. In conclusion the court labeled the totality of the circumstances "a sum of zeroes." Id. at 1192. The Court recognized that events that are wholly lawful may be suspicious within the proper context. All three factors "added up to zero" and therefore, there was no reasonable suspicion to initiate the stop. Id.

5. This Completely Anonymous Tip Lacked Sufficient Indicia of Reliability

The alleged tip by this un-named UPS driver contained no indicia of reliability, no independent corroboration, and did not constitute reasonable suspicion. First, Agent Padron did not even speak to the UPS driver himself. Second, the UPS driver apparently did not leave any identifying information. Third, this UPS employee did not have a history of providing accurate information to Border Patrol. Fourth, the tip did not predict any information that would not be known to the general public.

Similar to J.L., the only details provided by the UPS driver were the "subject's readily observable location and appearance," which the Supreme Court explicitly held was insufficient for executing an investigative stop. See J.L., 529 U.S. at 272. Just as in the informant in J.L. who claimed that the male would be standing at the Bus Stop, the UPS driver provided no predictive information nor evinced any knowledge of concealed criminal activity.

> An accurate description of a subject's readily observable location and appearance . . . . does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just its tendency to identify a determinate person.

Id. at 272. (emphasis supplied) citing 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

White placed great weight on the fact that the tip in that case provided details that were not easily known. See White, 496 U.S. at 332 "We think it also important that, as in Gates, The anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." Unlike the situation in White, this

UPS driver predict anything not easily predicted. The tipster in White provided specific details as to times, destinations, and detailed description of the car, information only known to someone with "inside information." Id. This UPS driver, at best, 'predicted' merely the location and description of the vehicle—in other words— "easily obtained facts and conditions existing at the time of the tip" which White and Gates held were insufficient. Id. (internal citations omitted). The UPS driver did not predict any movements or evince any insider information.

In Morales, the Ninth Circuit emphasized that a tip must provide predictive information pertaining to illegal activity. Morales, 252 F.3d at 1077 ("the tipster's ability to identify the car does not demonstrate that he or she had knowledge of concealed criminal activity"). This tip that only provided details that anyone near that road could have provided, demonstrated no knowledge of any inside information, let alone of concealed criminal activity. Therefore, the UPS drive's alleged hearsay statement is like the tip in Morales, that only provided a description of the automobile and of its drivers, but no indication that the tipster had knowledge of illegal activity. Id at 1076. ("This general prediction does not demonstrate, to the same extent as in white, that the informant had special knowledge of the defendant's itinerary.")

6. Border Patrol Observed Only Innocent Conduct and Failed to Corroborate Any Details of Illegality

When Border Patrol Agents saw the vehicle, they observed only innocent behavior. They did not observe anything to indicate alien smuggling; e.g., that the vehicle was riding low; a human head appearing from the back seat; etc. Thomas, clearly stated that the mere observation of innocent conduct is obviously insufficient grounds for pulling someone over, even if coupled with an unreliable tip. See Thomas, 211 F.3d at 1192.

IV.

SUPPRESS EVIDENCE FROM THE ILLEGAL AUGUST 2007 VEHICLE STOP[3]

A. Mr. Palos Has Standing

See above at Section III.A supra.

[3] Mr. Palos has been provided limited discovery regarding count one of the indictment. Mr. Palos may very well have to submit supplemental brief upon receipt of additional discovery.

B. The Seizure of the Vehicle Was Not Supported by Reasonable Suspicion

1. The Law

See above at Section III.B. supra.

2. Agent Padron Knew No Objective facts Indicating Illegal Activity

There were no objective facts, or inferences therefrom, that would support a finding of reasonable suspicion. The report alleges at the most three factors that could be considered indicative of criminal activity. First, the "travel[ing]" in and out of the designated lane of travel." See August 2007 Investigation Report at 3. Second,[4] that a human head emerged from the rear of the truck. Id. See Declaration of R. Palos (attached as Exhibit E). Third, Agent Wilson claims that "the explorer was swaying from side to side as if heavily laden." Mr. Palos claims that the explores was not swaying from side to side. See Declaration of R. Palos. But even if they did occur, they do not indicate criminal activity. Agent Wilson does not allege any of the suspicion factors present in Arvizu. Agent Wilson does not state that Mr. Palos was near the border; that it appeared that Palos had circumvented a checkpoint; that he had received sensor alerts; that Palos was driving stiffly or rigidly[5]; that occupants were waiving mechanically.

Agent Wilson did run a records check, and learned that the car was registered to some address.[6] It does not appear that there were any warrant or alerts associated with that vehicle at that time. See August 2007 Investigation Report at 3. The fact that Mr. Palos was "sitting up right and wearing [his] seatbelt[]" does not contribute to a finding of reasonable suspicion. If wearing one's seatbelt contributed to reasonable suspicion, Mr. Palos would find himself in a"damned if you do, equally damned if you don't situation, especially when tier conduct conforms to the safe-driving advice given by the California Department of Motor Vehicles." Sigmond-Ballesteros, 285 F.3d at 1123 (citing United States v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. 2000) (internal citations omitted)).

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[4] Mr. Palos recognizes Agent Padron's cursory statement that explorers were used by Alien Smugglers. However, that does not create reasonable suspicion for reasons: 1) he did not provide any foundation for this statement; and 2) it should not be considered under Sigmond-Ballesteros, because it would cast a net around too many innocent people. See 285 F.3d at 1121.

[5] Mr. Palos recognizes that Agent Wilson alleged that he was sitting upright, which is distinguishable from the stiff and rigid the drivers maintained in Arvizu. See 234 U.S. at 270.

[6]Mr.Palos requested this address from A.U.S.A. Blankenship. If he does not receive it by the time of the motion hearing, he will add this to his discovery request.

Thus, at the time of the arrest, the only uncontested facts Agent Wilson was aware of was that someone was driving a validly registered truck on Interstate-8.

VI.

THE INDICTMENT SHOULD BE DISMISSED DUE TO MISINSTRUCTION OF THE GRAND JURY

Mr. Palos moves to dismiss the Indictment due to misinstruction of the Grand Jury. Mr. Palos's arguments are essentially those set out in Judge Hawkins' dissent in United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002), cert. denied, 1538 U.S. 934 (2003) and Judge Kozinski's dissent in United States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004), opinion vacated by and en banc review granted by United States v. Navarro-Vargas, 367 F.3d 920 (9th Cir. 2004), and he incorporates those arguments by reference. He also incorporates those factual and legal arguments recently advanced in United States v. Martinez-Covarrubias, Case No. 07cr0491-BTM (S.D. Cal.), including Judge Burns' particular treatment of the grand jurors, and denied by District Judge Moskowitz. See United States v. Martinez-Covarrubias, Case No. 07cr0491-BTM (S.D. Cal. Oct. 11, 2007) (order attached hereto as Exhibit H); Reporter's Partial Transcript of the Proceedings (Instructions), dated January 11, 2007 (Exhibit I hereto); Reporter's Transcript of Proceedings (Voir Dire), dated January 11, 2007 (Exhibit F hereto).

However, if the Court would like further briefing on this issue, Mr. Palos would readily provide it.

VI.

THIS COURT MUST HOLD A VOLUNTARINESS HEARING TO DETERMINE THE ADMISSIBILITY OF ANY STATEMENTS ALLEGEDLY MADE BY MR. PALOS[7]

A. The Government Must Demonstrate Compliance With *Miranda*.

Based on information provided by the government, it appears that Mr. Palos was interrogated while he was in custody, and that he made statements to the agents as a result of this interrogation.

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[7] This motion pertains to statements allegedly made during the August 2007 and February 2008 arrests.

1. *Miranda* Warnings Must Precede Custodial Interrogation.

The Supreme Court has held that the government may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody, or otherwise deprived of his freedom of action in any significant way. Id. See Orozco v. Texas, 394 U.S. 324, 327 (1969). A suspect is in custody if the actions of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably have led him to believe that he could not freely leave. See United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982); United States v. Bekowies, 432 F.2d 8, 12 (9th Cir. 1970).

Once a person is in custody, Miranda warnings must be given prior to any interrogation. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980). Those warnings must advise the defendant of each of his or her "critical" rights. United States v. Bland, 908 F.2d 471, 474 (9th Cir. 1990), cert. denied, 506 U.S. 858 (1992). If a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease. Miranda, 384 U.S. at 474. See also Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). In this case, Mr. Palos was questioned after his arrest and before his Miranda rights were read to him. This questioning elicited incriminating responses regarding the charges now pending. These statements must be suppressed.

2. The Government Must Demonstrate That Any Alleged Waiver by Mr. Palos After He Invoked His Rights Was Voluntary, Knowing, and Intelligent.

When "interrogation continues without the presence of an attorney, and a statement is taken, a *heavy* burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda, 384 U.S. at 475 (emphasis added) (citation omitted). It is undisputed that any waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently, and voluntarily in order to be effective. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The standard of proof for a waiver of this constitutional right is high. Miranda, 384 U.S. at 475. See United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (the burden on the government is great; the court must indulge every reasonable presumption against waiver of fundamental constitutional rights) (emphasis added).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477 (1981); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Heldt, 745 F.2d at 1277; United States v. McCrary, 643 F.2d 323, 328-29 (5th Cir. 1981).

In Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1990), cert. denied, 502 U.S. 853 (1991), the Ninth Circuit confirmed that the issue of the validity of a Miranda waiver requires a two prong analysis. The waiver must be both: (1) voluntary; and (2) knowing and intelligent. Id. at 820. The voluntariness prong of this analysis "is equivalent to the voluntariness inquiry under the [Fifth] Amendment . . .." Id. However, the second prong, requiring that the waiver be "knowing and intelligent," mandates an inquiry into whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id. at 820-21 (quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). This inquiry requires this Court to determine whether "the requisite level of comprehension" existed before the purported waiver may be upheld. Id. Thus, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (quoting Spring, 479 U.S. at 573) (emphasis in original) (citations omitted).

Unless and until the government demonstrates Miranda warnings and a knowing and intelligent waiver, no evidence obtained as a result of the interrogation can be used against the defendant. Miranda, 384 U.S. at 479. In this case, the government has the burden of proving that an agent read Mr. Palos his Miranda rights, and that Mr. Palos intelligently and voluntarily waived those rights in all situations in which he reasonably believed that he was not free to leave. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980).

B. The Government Must Prove Mr. Palos' Statements Were Voluntary.

Even when the procedural safeguards of Miranda have been satisfied, assuming the government can meet its burden, a defendant in a criminal case is deprived of due process of law if the conviction is founded upon an involuntary confession. Arizona v. Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the burden of proving not only that a confession was made, but also that the confession was voluntary by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 483 (1972).

In order to be voluntary, a statement must be the product of a rational intellect and free will. Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining whether a defendant's will was overborne in a particular case, the totality of the circumstances must be considered. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Some factors taken into account have included the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep. Id.

A confession is deemed involuntary not only if coerced by physical intimidation, but also if achieved through psychological pressure. "The test is whether the confession was 'extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence.'" Hutto v. Ross, 429 U.S. 28, 30 (1976) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Accord United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

C. Mr. Palos Requests That This Court Conduct An Evidentiary Hearing.

This Court must make a factual determination as to whether a confession was voluntarily given prior to its admission into evidence. 18 U.S.C. § 3501(a). Where a factual determination is required, courts are obligated by FED. R. CRIM. P. 12 to make factual findings. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading. Under section 3501(b), this Court must consider various enumerated factors in making the voluntariness determination, including whether the defendant understood the nature of the charges against him and whether he understood his rights. Without the presentation of evidence, this Court cannot adequately consider these statutorily mandated factors. Mr. Palos accordingly requests that this Court conduct an evidentiary hearing pursuant to 18 U.S.C. § 3501(a), to determine, outside the presence of the jury, whether any statements made by the defendant were voluntary.

VIII.

MOTION TO PRESERVE AND INSPECT EVIDENCE

Mr. Palos requests the preservation of all physical evidence in this case. This includes any evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government (or its private contractors) in this case. See United States v. Riley, 189 F.3d 802, 806-08 (9th Cir.1999). This request includes, but is not limited to: (1) the defendant's personal effects; (2) personal effects belonging to any of the material witnesses related to this case, including any papers and telephones; (3) the truck; (4) any videotapes capturing Mr. Palos or any third party in relation to this case, including footage taken at the checkpoint or by the California Highway Patrol; (5) any recorded communications made by government or non-government officials related to the above captioned case, e.g., 911 or dispatch tapes; and, (6) any other evidence seized from the defendant or any third party in relation to this case. This request also includes any material or percipient witnesses who might be deported or otherwise likely to become unavailable (e.g., undocumented aliens and transients). Mr. Palos requests that government counsel be ordered to notify the agencies and private contractors with custody of such evidence be informed of the Court's preservation order. Further, Mr. Palos requests an order granting defense counsel and/or their investigators access to the evidence for the purposes of investigation, including inspection, and photographing. FED. R. CRIM. P. 16(a)(1)(C). A proposed Order is attached for the convenience of the Court.

Specifically, Mr. Palos requests preservation of, and an opportunity to inspect, the 1992 Ford Explorer, VIN # 1FMDU32X2NUD76406 that was seized in the August, 7, 2007 arrest. See August 2007 incident report at 3. Mr. Palos also requests the preservation of the 1996 Doge Ram, VIN # 3B7HC13YXTG165748, seized in the August 2008 arrest. See August 2008 Investigation Report at 1. Mr. Palos also requests preservation of any radio relays involving Border Patrol Agents Padron and Simon and the UPS driver that contacted Agent Simon. See August 2008 Investigation Report at 2. He further requests preservation of any video records or written memorializations of his post arrest statements from August 7, 2007 or April 18, 2006.

Mr. Palos requests that the above materials be preserved throughout the pendency of the case, including any appeals.

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VIII.

MOTION TO COMPEL DISCOVERY[8]

Mr. Palos requests, pursuant to Federal Rule of Criminal Procedure 16 and Brady and its progeny, and any other relevant law. This includes material that may support any defense pre-trial motions. See United States v. Cedano-Arellano, 332 F.3d 568 (9th Cir. 2003) (Rule 16 applies to discovery material to defense pre-trial motions); United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000) (Brady applies to material supporting defense pre-trial motions).

Additionally, pursuant to Rule 12(b)(4)(B), Mr. Palos requests all evidence to which Mr. Palos would be untitled under Rule 16, so that he may timely properly negotiate his motions for the upcoming hearing in front of this Court.

This request for discovery is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies" under United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989):

(1) Mr. Palos' Statements. The government must disclose: (a) copies of any written or recorded statements made by Mr. Palos; (b) copies of any written record containing the substance of any statements made by Mr. Palos; and (c) the substance of any statements made by Mr. Palos that the government intends to use, for any purpose, at trial. See FED. R. CRIM. P. 16(a)(1)(A)-(B). This request specifically includes a copy of any **audio and video-taped statements** of Mr. Palos and any rough notes agents took of his statements. **This requests includes, but is not limited to, the video tape of Mr. Palos' post arrest statements in August, 7, 2007. He further requests production of any video records or written memorializations of his post arrest statements from August 7, 2007 or April 18, 2006.**

(2) Mr. Palos's Prior Record. Mr. Palos requests disclosure of his prior record. This includes Mr. Palos' record of contacts with the United States Border Patrol and/or the Immigration and Naturalization Service, even if those contacts did not result in prosecution. See FED. R. CRIM. P. 16(a)(1)(D).

(3) Arrest Reports, Notes and Dispatch Tapes. Mr. Palos also specifically requests the government to turn over all arrest reports, notes, dispatch or any other tapes that relate to he circumstances surrounding

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[8] This requests pertains to all counts of the indictment.

his arrest or any questioning. This request includes, but it is not limited to, any rough notes, photographs, records, reports, transcripts or other discoverable material. FED. R. CRIM. P. 16 (a)(1)(A)-(B), (E); Brady v. Maryland, 373 U.S. 83 (1983). The government must produce arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant. FED. R. CRIM. P. 16 (a)(1)(A)-(B), (E); FED. R. CRIM. P. 26.2.

This requests includes, but is not limited to, any reports by the UPS driver that communicated with Border Patrol Agent Simon.

(4) Documents and Tangible Objects. Mr. Palos requests the opportunity to inspect, copy, and photograph all documents and tangible objects which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to him. See FED. R. CRIM. P. 16(a)(1)(E).

(5) Reports of Scientific Tests or Examinations. Mr. Palos requests the reports of all tests and examinations which are material to the preparation of the defense or are intended for use by the government at trial. See FED. R. CRIM. P. 16(a)(1)(F).

(6) Expert Witnesses. Mr. Palos requests the name and qualifications of any person that the government intends to call as an expert witness. See FED. R. CRIM. P. 16(a)(1)(G). In addition, Mr. Palos requests written summaries describing the bases and reasons for the expert's opinions. See id. We request that the Court order the government to notify the defense as such in a timely manner, so that a proper 104 (Kumho-Daubert) admissibility hearing can be conducted without unduly delaying the trial.

(7) Brady Material. Mr. Palos requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt or punishment. See Brady v. Maryland, 373 U.S. 83 (1963). This request specifically includes a copy of any **audio and video-taped statement** of material witnesses and any rough notes agents took of their statements.

In addition, impeachment evidence falls within the definition of evidence favorable to the accused, and therefore Mr. Palos requests disclosure of any impeachment evidence concerning any of the government's potential witnesses, including prior convictions and other evidence of criminal conduct. See United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to, any complaints filed (by a member of the public, by another agent, or any other person) against the agent, whether or not the investigating authority has taken any action, as well as any matter for which a disciplinary review was undertaken, whether or not any disciplinary action was ultimately recommended. In addition, Mr. Palos requests any evidence tending to show that a prospective government witness: (a) is biased or prejudiced against the defendant; (b) has a motive to falsify or distort his or her testimony; (c) is unable to perceive, remember, communicate, or tell the truth; or (d) has used narcotics or other controlled substances, or has been an alcoholic.

(8) Request for Preservation of Evidence. Mr. Palos specifically requests the preservation of all physical or documentary evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and that relate to the arrest or the events leading to the arrest in this case.

(9) Any Proposed 404(b) Evidence. "[U]pon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under Rule 404(b). FED. R. EVID. 404(b). Mr. Palos requests such notice three weeks before trial in order to allow for adequate trial preparation.

This includes any “TECS” records (records of prior border crossings) that the Government intends to introduce at trial, whether in its case-in-chief, impeachment, or rebuttal. Although there is nothing intrinsically improper about prior border crossings, they are nonetheless subject to 404(b), as they are “other acts” evidence that the government must produce before trial. See United States v. Vega, 188 F.3d 1150, 1154-55 (9th Cir. 1999).

(10) Witness Addresses. Mr. Palos’s counsel requests access to the government’s witnesses. Thus, counsel requests a witness list and contact phone numbers for each prospective government witness. Counsel also requests the names and contact numbers for witnesses to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as government witnesses.

(11) Jencks Act Material. Mr. Palos requests production in advance of trial of all material discoverable pursuant to the Jencks Act, 18 U.S.C. § 3500. Advance production will avoid needless delays at pretrial hearings and at trial. This request includes any “rough” notes taken by the agents in this case; these notes must be produced pursuant to 18 U.S.C. § 3500(e)(1). This request also includes production of transcripts of the testimony of any witness before the grand jury. See 18 U.S.C. § 3500(e)(3).

(11a) Original I-213s. Counsel has not received the typewritten I-213s pertinent to this case. Typically, however, in addition to the typewritten ones, the agents hand-write I-213 and related materials in the field. Later, those notes are typed into the computer. Counsel hereby requests the aforementioned handwritten notes.

(12) Informants and Cooperating Witnesses. Mr. Palos requests disclosure of the name(s), address(es), and location(s) of all informants or cooperating witnesses used or to be used in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against Mr. Palos. Roviaro v. United States, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from informants which exculpates or tends to exculpate Mr. Palos. Brady v. Maryland, 373 U.S. 83 (1963). The government must disclose any information indicating bias on the part of any informant or cooperating witness. Id.

This request includes, but is not limited to, the name of the UPS driver that communicated with Border Patrol Agent Simon.

(13) Residual Request. Mr. Palos intends by this discovery motion to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States.

X.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

Defense counsel has received one-hundred and thirty-three pages of discovery. As information comes to light, due to the government providing additional discovery in response to these motions or an order of this Court, Mr. Palos may find it necessary to file further motions.

XI.

CONCLUSION

For the foregoing reasons, Mr. Palos respectfully requests that the Court grant the above motions.

Respectfully submitted,

DATED: April 1, 2008

/s/ ERICK L. GUZMAN

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CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best information and belief, and that a copy of the foregoing document has been caused to be delivered this day upon:

Courtesy Copy Chambers

Copy Assistant U.S. Attorney via ECF NEF

Copy Defendant

Dated: April 1, 2008

/s/ ERICK L. GUZMAN

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